1988

Brian M. Barnard v. Utah State Bar and Stephen Hutchinson : Brief of Appellant

Utah Supreme Court

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THE SUPREME COURT

OF THE STATE OF UTAH

BRIAN M. BARNARD,	)	
	)	
Plaintiff and	)	
Respondent	)	
	)	
vs.	)	Case No. 880201
	)	
UTAH STATE BAR and	)	
STEPHEN HUTCHINSON,,	)	
	)	
Defendants and	)	
Appellants.	)	

APPELLANTS' BRIEF

Appeal from a Judgment of the
Third Judicial District Court for Salt lake County
Honorable Homer F. Wilkinson, Judge

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IN THE SUPREME COURT

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OF THE STATE OF UTAH

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I. JURISDICTION AND NATURE OF PROCEEDINGS

Respondent commenced this action to obtain an Order requiring Appellants to disclose salary information concerning employees to Respondent. Summary Judgment was entered in favor of Respondent. This Court has jurisdiction of this Appeal pursuant to Utah Code Ann., Sec. 78-2-2(3)(i).

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

The following issues are presented for review on this Appeal:

1. Is the Appellant Utah State Bar (the "Bar") a state agency and therefore required to disclose to Respondent Brian M. Barnard ("Barnard") salary information concerning the Bar's employees under the provisions of the Archives and Records Services and Information Practices Act (Utah Code Ann., Sec. 63-2-59, et seq.) (hereinafter the "Records Act") and the Public and Private Writings Act (Utah Code Ann., Sec. 78-26-1, et seq.) (hereinafter the "Writings Act")?

2. Can either the Records Act or the Writings Act be constitutionally applied to the Bar?

III. STATEMENT OF THE CASE

A. Proceedings in the Court Below.

Barnard commenced this action against the Bar and its Executive Director, Stephen F. Hutchinson ("Hutchinson"), seeking an Order requiring the Bar to disclose to him the exact salaries and benefits received by all employees of the Bar on the basis that the Bar is allegedly a state agency and is therefore required to disclose this information pursuant to the provisions of the Records Act and the Writings Act. Barnard also sought punitive damages and attorneys' fees.

Shortly after the Complaint was filed, Barnard moved for Summary Judgment. On May 9, 1988, the Court, the Honorable Homer F. Wilkinson, Judge, granted Barnard's Motion for Summary Judgment requiring the Bar to disclose the salary information to Barnard, but denied Barnard's demand for punitive damages and attorneys' fees. Execution on the Judgment was stayed pending appeal.

B. Statement of Facts.

Barnard is a member of the Bar. [R. 22] In November 1987, Barnard requested information concerning salaries and benefits paid to Bar employees. [R. 23] In response, the Bar voluntarily provided him salary ranges for different categories of Bar employees and a description of fringe benefits for the Bar staff. [R. 24]

Not satisfied with the information provided by the Bar, Barnard filed this lawsuit contending that the Bar is a state

agency and is therefore required to supply detailed salary information for all its employees to him.

The Bar is an unincorporated, non-profit organization which was originally organized in 1931. In 1981, the Utah Supreme Court integrated the Bar. At the same time, the Supreme Court adopted the "Rules for Integration of the Utah State Bar" and "Rules of Organization and Management of the Utah State Bar". In its rules, the Supreme Court perpetuated, created and continued the Bar under the direction and control of the Court. [R. 101]

The Bar is entitled to sue and be sued, to enter into contracts and to hold and dispose of property. [R. 102] The Bar is authorized to and has adopted its own bylaws for the governance of its affairs. [Rule (A)9, Rules for Integration and Management of the Utah State Bar] All funds and property of the Bar, both before and after integration, are owned privately by the Bar and not by the State of Utah or any other governmental entity. The Bar owns its own office building. The Bar is not financially supported by any taxes or any other public funds. Rather, the Bar is supported solely by dues and fees paid by its members and Bar applicants. [R. 102] The Bar pays property taxes on the real and personal property which it owns, unlike state agencies which are exempt. [R. 102] Bar employees are not paid by the state, are not entitled to join any of the state's retirement programs and are not entitled to obtain insurance through the state. [R. 102]

The Utah Supreme Court has the sole constitutional authority to regulate the Bar and the practice of law in Utah.

Utah Constitution, Art. VIII, Section 4. The Supreme Court has delegated to the Bar certain responsibilities. However, all decisions by the Bar and its authorized committees concerning the admission, suspension or disbarment of members of the Bar are advisory only to the Supreme Court, which retains the constitutional power to admit, discipline or disbar members of the Bar. [R. 102]

Although the Bar in all its functions is subject to the supervision and control of the Supreme Court, the Bar engages in numerous activities other than the admission and discipline of attorneys which the Supreme Court has not chosen to directly regulate or supervise such as semi-annual Bar meetings, various educational courses and seminars, a newsletter and the Law and Justice Center in Salt Lake City. [R. 102-103]

IV. SUMMARY OF ARGUMENT

A. The Bar is Not a State Agency.

The Bar is not a state agency and is therefore not subject to the Records Act or the Writings Act. Although the Bar was "perpetuated, created and continued" by the Supreme Court and is subject to strict regulation, the Bar privately owns its property and pays taxes and is governed by its own by-laws just like other private organizations. Although the Supreme Court has delegated certain administrative functions relating to the admission and discipline of attorneys to the Bar and with regard to those functions the Bar acts as an agent or arm of the Court, that does not make the Bar a state agency for all purposes.

B. The Statutes Cannot be Constitutionally Applied to the Bar.

Even if the Bar was otherwise subject to the Records Act or the Writings Act, under the Separation of Powers Doctrine those statutes cannot constitutionally be applied to the Bar which is an arm of the Supreme Court.

V. ARGUMENT

A. The Bar is Not a State Agency and is Therefore Not Required to Disclose the Salaries of Its Employees.

Barnard argued in the court below that under both the Records Act and Writings Act he was entitled to receive specific salary information concerning all Bar employees. The District Court agreed, ruling that the Bar is a "state agency" and is therefore required to disclose this salary information to Barnard under both Acts. [R. 144] It is respectfully submitted that the District Court commited error as the Bar is not a state agency.

Sec. 63-2-61(2) of the Records Act defines "state agency" as:

> . . . A department, division, board, bureau, commission, council, institution, authority, or other unit, however designated of the state." [1]

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[1] Although the Records Act purports to apply to "officers of any court," there appears on the face of the statute to be an equally compelling argument that the Act was not intended to apply to the judicial branch of state government. In that regard, Sec. 62-2-79 states:

> "Upon request, the archivist shall assist and advise the establishment of records-management programs in the legislative and judicial branches of state government and shall, as required by them, provide program services similar to those available to the executive branch of state government pursuant to the provisions of this act." (fn continued)

The Writings Act neither utilizes nor defines the term "state agency". Rather, the Writings Act refers to "public writings" and "public officers". The bar would concede, however, that ifthe Bar is in fact a "state agency", the Writings Act on its face applies to the Bar.

The Utah Supreme Court has never had occasion to address the issue of whether the Bar is somehow to be considered a state agency. However, an analysis of the organization and operation of the Bar, as well as relevant judicial decisions, leads to the conclusion that the Bar should not be considered a state agency, but a private organization which performs certain public functions and is regulated and supervised by the Supreme Court as are all attorneys.

The Bar is an unincorporated, non-profit organization which the Supreme Court "perpetuated, created and continued" when it integrated the Bar in 1981. The Bar was initially organized in 1931. In many respects, the Bar functions as a professional association. The Bar has the authority and capacity to sue and to be sued, to execute contracts and to hold and dispose of property. In this connection, the Utah Supreme Court has made it very clear in its rules that the Bar's property, both real and personal, is <u>private</u> property, owned by the Bar, and is not owned by the state. [Rule (A)1, <u>Rules for</u>

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1 That section seems to contemplate an elective not mandatory program by the legislative and judicial branches, therefore implying applicability only to the executive branch.

Integration and Management of the Utah State Bar.] Further, the Bar pays taxes both on its real and personal property. Private ownership of property and liability for taxes are both absolutely and totally irreconcilable with any notion that the Bar is a state agency. Indeed, by filing this action, Barnard implicitly recognized that the Bar is not a state agency because he didn't even attempt to give a notice of claim which would have been required before filing suit against a state agency. See, U.C.A., Sections 63-30-11 and 63-30-12.

Although the Supreme Court regulates and supervises the Bar by virtue of its constitutional power to govern the practice of law, the Bar is in large part self-governed through Bar commissioners which are elected by Bar members, and an Executive Director who is selected by the commissioners. Further, the Bar was authorized by the Supreme Court to and has in fact adopted its own bylaws. Although the Supreme Court has the power to regulate all functions of the Bar, the Court has not chosen to regulate or supervise many of its activities, such as educational courses and seminars, Bar meetings, a newsletter and the Law and Justice Center. The Bar does not receive any public funds, but is funded solely by dues and fees paid by its members and Bar applicants. The employees of the Bar are not paid by the state, nor are they entitled to any of the benefits enjoyed by state employees, such as membership in a state retirement plan or insurance.

In the Trial Court, Barnard contended that because the Bar was created by the Supreme Court and/or the Legislature and is regulated and supervised by the Supreme Court, the Bar is a

state agency. This conclusion simply does not follow. For example, in Utah Technology Finance Corp. v. Wilkinson, 723 P.2d 406 (Utah 1986), the Utah Technology Finance Corp. ("UTFC") had been created by the Legislature in 1985 and funded with One Million Dollars ($1,000,000) of public funds for the purpose of assisting in the development of small high-tech businesses. By statute, the State Treasurer was made the custodian of all of the funds appropriated to the UTFC, as well as any other funds that the UTFC acquired. The UTFC was required to make an annual report to the Governor and was subject to annual audit by the State Auditor. The UTFC was governed by trustees appointed for three-year terms by the Governor with the consent of the Senate. Thus, the UTFC was created by the Legislature, was funded with tax monies and was subject to strict regulation and control by the state. Nevertheless, the Supreme Court held that the UTFC was not a state agency, but was intended by the Legislature to be, and in fact was, an independent, public non-profit corporation.

The case of Matter of Washington State Bar Association, 548 P.2d 310 (Wash. 1976), is also instructive. There, the Washington State Auditor sought to audit the Washington State Bar under a statute giving him the power to audit any state agency or department. The Auditor argued that the fact that the State Bar Act of 1933 referred to the Washington Bar as "an agency of the state" was determinative on the issue of whether the Bar was a state agency and thus subject to audit. The Washington Supreme Court determined that the meaning of the term "agency" depends on its context and held that the Legislature

did not intend to subject the Bar to audits and that the Bar was not a state agency within the meaning of the subject statute.

Barnard argued, and the District Court ruled, that the case of Redding v. Brady, 606 P.2d 1193 (Utah 1980), is controlling in the case at bar. It is respectfully submitted that Redding provides little guidence in the present case. All the Supreme Court decided in Redding was that Weber State College was a public institution, heavily dependent upon tax funds for its operation, and, therefore, was required to disclose the salaries of its employees under the Records Act. Appellants have no quarrel with the Redding case. Obviously, Weber State College is a public institution. The Bar is not. In this connection, it is important to note that the Supreme Court justified the right of the public to access to the salary information upon the basis that Weber State College received public tax funds and the public had a right to know how its taxes were being spent. The Bar does not receive any tax monies or any other funds from the state.

The Supreme Court has the constitutional power to govern the practice of law in the State of Utah. That power includes the power to regulate and control attorneys who are officers of the court. The authority which the Supreme Court has given to the Bar in the areas of licensing and discipline is simply a delegation of certain of the Supreme Court's powers. In re Disciplinary Action of McCune, 717 P.2d 701 (Utah 1986); In re Utah State Bar Petition, Etc., 647 P.2d 991 (Utah 1981). The Supreme Court could just as well have delegated those responsibilities to specific attorneys or other individuals.

The fact that the Supreme Court has chosen to delegate certain responsibilities with respect to the admission and discipline of the members of the Bar to the Bar itself, probably means that the Bar engages in "state action" insofar as certain constitutional issues such a due process are concerned when the Bar performs those specifically delegated functions. However, that does not mean that the Bar itself is somehow transformed into a state agency for all purposes.

In this regard, "public officers" are subject to the provisions of the Records Act. Sec. 63-2-61 of that Act defines "public officers" as including "officers of any court." All attorneys are officers of the courts. In re Disciplinary Action of McCune, 717 P.2d at 705. Certainly, Barnard would not argue that therefore all attorneys are public officers and subject to the provisions of the Records Act. The mere fact that attorneys or the Bar itself may be considered officers of the Supreme Court or as acting by its authority does not transform them into a state agency.

In summary, the Bar is a private organization which is largely self-governing but which is subject to the regulation and control of the Supreme Court (just as all attorneys are) and which has been delegated by the Supreme Court certain responsibilities to police its own members. There is absolutely no indication, either in the legislative history of previously applicable statutes, or in the superceding rules adopted by the Supreme Court, that the Bar was intended to be a state agency. Indeed, such a holding would be absolutely irreconcilable with

the Supreme Court rule recognizing the Bar's right to privately own property and the fact that the Bar is required to pay taxes.

B. The Statutes Cannot be Constitutionally Applied to the Bar.

Even if this Court were to determine that the Bar is a state agency, neither the Records Act nor the Writings Act can constitutionally be applied to the Bar.

In its official functions, the Bar is an arm of the Supreme Court. The statutes cannot constitutionally be applied to the Bar because the Supreme Court has the sole constitutional right to administer the judicial department and govern the practice of law.

Art. V, Sec. 1, of the Utah Constitution provides:

> The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

Art. VIII, Sec. 4, of the Utah Constitution provides in part:

> The Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law.

The Legislature has no power or authority as to which of the judiciary's records shall be opened to the public or the process by which that determination is made. To allow the Legislature to do so would be an impermissible incursion upon the prerogatives of the Supreme Court.

For example, the Writings Act expressly includes as a public writing "judicial records". Utah Code Ann., Sec. 78-26-1(2). The Writings Act then goes on to provide that, "every citizen has a right to inspect and take a copy of any public writing or this state except as otherwise expressly provided by statute." Utah Code Ann., Sec. 78-26-2. This statute would purport to deny the courts the right to seal case files. Although there is a common law right for the public to inspect court records, that right is not absolute and it is up to the courts to decide in a given case whether that right is outweighed by competing interests. See, Huntsman-Christensen Corp. v. Entrada Industries, 639 F.Supp. 733 (D.Utah 1986).

In Pasik v. State Board of Law Examiners, 478 N.Y.S.2d 270 (N.Y. 1984), the plaintiff sought certain information from the New York Bar concerning his Bar exam pursuant to the provisions of the Freedom of Information Law. The Court held that plaintiff was not entitled to this information as the judiciary was expressly exempted from the Law and that the Bar in the discharge of its official duties was a part of the judiciary.

In Matter of Washington State Bar Assoc., supra, the Court held that the Washington State Bar Assoc. was not subject to audit by the State Auditor under the Separation of Powers Doctrine. The Court observed:

> There is yet another ground that renders petitioner's attempted audit inappropriate. We have earlier made clear that the regulation of the practice of law in this state is within the inherent power of this Court. This is the holding of the vast majority of courts in this country that have considered this issue. [Citations omitted]

> . . . "[T]his Court does not share the power of discipline, disbarrment, suspension or reinstatement with either the Legislature or the State Bar Association. The ultimate constitutional power clearly lies within the sole jurisdiction of the Supreme Court." . . . We also there established that in spite of the language of the State Bar Act, the association was not an "agency of government" so as to be one of the "state executive offices" required . . . to move their principal place of business to the seat of government. The State Bar Association, we recognized, is an association that is sui generis many of whose important functions are directly related and in aid of the judicial branch of government.
>
> . . . The Legislature's characterization of the Bar as an "agency of the state" does not deprive this Court of its right of control of the Bar and its functions as a separate, independent branch of government. [548 P.2d at 315-316]

Similarly, in Ex Parte Auditor of Public Accounts, 609 S.W.2d 682 (KY. 1980), the Court held that the Auditor of Public Accounts of the State of Kentucky was not entitled to audit the books and accounts of the Kentucky Bar Association, observing:

> As we have indicated, we have no doubt that the General Assembly has the authority to require an accounting of funds it has appropriated from revenues it has caused to be raised. What we have in this case, however, are funds that have not been collected pursuant to any statute and have no been appropriated by the legislative body and are not subject to legislative appropriation. Both the Association and the Board of Bar Examiners exists solely by virtue of rules of this Court expressly and exclusively authorized by Const. Sec. 116. There is no constitutional authority by which they can be made accountable to either of the other two branches of government except for their stewardship of such funds or property as may come into their possession through these sources. Neither of those agencies has any such funds or property. Their funds and property are public funds and property because their official functions are entirely public in nature, but their accountability is to this Court only, of which they are an integral part. [Id. at 686]

In summary, it is not for the Legislature to determine what records the judiciary will and will not make public or to prescribe the manner in which such a determination is made. The Bar is an arm of the judiciary. Consequently, neither the Records Act nor the Writings Act can constitutionally be applied to the Bar.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Summary Judgment entered in favor of Barnard should be reversed with directions to enter Judgment in favor of the Bar.

DATED this 8th day of September, 1988.

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MAILING CERTIFICATE

I HEREBY CERTIFY that 4 copies of the foregoing was mailed to the following on the 8th day of September, 1988:

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